

2013 IL App (2d) 120891-U
No. 2-12-0891
Order filed December 26, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-2222
)	
TIYON E. TYSON,)	Honorable
)	Kathryn E. Creswell,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

ORDER

¶1 *Held:* The trial court properly dismissed defendant's postconviction petition, which alleged that his guilty plea was induced by ineffective assistance of counsel: his factual premise was contradicted by his testimony on his motion to withdraw his plea, and he did not articulate a plausible defense that he could have raised at trial.

¶2 Defendant, Tiyon E. Tyson, pleaded guilty to one count of aggravated battery of a child (720 ILCS 5/12-4.3(a), (b)(1) (West 2008)), a Class X felony. He filed a postconviction petition. The trial court dismissed it as frivolous and patently without merit. Defendant appeals, contending that his petition stated the gist of a claim that his guilty plea was involuntary because his attorney failed

to correct the trial court's mistaken admonishment that he was eligible for an extended-term sentence. We affirm.

¶ 3 Defendant was charged with two counts of attempted murder (720 ILCS 5/8-4(a), 9-1(a) (West 2008)), two counts of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2008)), and four counts of aggravated battery (720 ILCS 5/12-4(b)(1) (West 2008)), arising from an incident on August 3, 2008. He pleaded guilty to one count of aggravated battery of a child, in exchange for the dismissal of the other charges. The trial court told defendant that he was eligible for a sentence of between 6 and 30 years' imprisonment, or an extended-term sentence of between 30 and 60 years based on the fact that the victim was less than 12 years old at the time of the offense. Defendant stated that he understood the charge and possible sentences, and was pleading guilty voluntarily. He told the court that no one had promised him anything beyond the specific terms of the plea agreement.

¶ 4 The factual basis for the charge was that, on August 3, 2008, defendant, Dawn Sanders, and Sanders' son, J.L., were at a bowling alley. After they left, defendant and Sanders got into an altercation. Defendant got into his car and drove up to Sanders and J.L., where he and Sanders continued to argue. As Sanders and J.L. walked away, defendant drove his vehicle in reverse and maneuvered into their path. Defendant's vehicle struck J.L. and Sanders, and J.L. was dragged under the vehicle. Defendant drove away. J.L. suffered three broken ribs, abrasions and contusions on his face and the side of his head, a lacerated spleen, and a laceration to his ear. He underwent surgery to remove his spleen. J.L. was 11 years old at the time.

¶ 5 Following a sentencing hearing, the trial court sentenced defendant to 18 years in prison. Defendant later moved to withdraw his plea, contending, *inter alia*, that his attorney had told him

that “by taking the blind plea I’m taking reponbility [sic] for my action and the judge would give me the min [sic] or close to It [sic].” An amended motion filed by counsel alleged, “defendant was informed by his attorney that he would receive the minimum sentence of six years.” In support of the motion, defendant testified that his attorney advised him to accept a blind plea, “and since I don’t have a background or anything, that it’s possible that I can get something closer to the minimum.” The trial court denied the motion and defendant appealed.

¶ 6 On direct appeal, defendant’s principal argument was that the trial court’s mistaken belief that he was eligible for an extended term affected its decision to sentence him to 18 years’ imprisonment. We rejected that contention, noting that the sentence was not close to the maximum nonextended term of 30 years, and it was thus inconceivable that the court’s mistaken belief that defendant was eligible for an extended term influenced its decision. *People v. Tyson*, 2011 IL App (2d) 100557-U.

¶ 7 Defendant then filed a postconviction petition. In it, he alleged, *inter alia*, that his trial counsel was ineffective for allowing defendant to believe that he was eligible for an extended-term sentence, and that defendant was “induced” to plead guilty by the belief that he could receive up to 60 years in prison if found guilty after a trial. The trial court dismissed the petition as frivolous and patently without merit. Defendant timely appeals.

¶ 8 Defendant contends that his petition stated the gist of a claim that he received the ineffective assistance of counsel. He maintains that counsel’s failure to correct the trial court’s mistaken admonishment that he was eligible for an extended-term sentence induced him to plead guilty for fear of receiving such a sentence. The State responds that defendant could have raised this issue on direct appeal but did not, thus forfeiting it. It further contends that the record refutes defendant’s

contentions, given that he testified that he pleaded guilty because he anticipated receiving close to the minimum sentence, not because he feared receiving an extended-term sentence. The State further contends that defendant cannot show prejudice as a result of his counsel's allegedly deficient representation, because he has not claimed that he is actually innocent or articulated a plausible defense he could have raised had he gone to trial.

¶9 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a method by which criminal defendants can assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction proceeding contains three distinct stages. *Id.* at 10. At the first stage, the trial court must, within 90 days of the petition's filing, independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or is patently without merit. *Id.*; see 725 ILCS 5/122-2.1(a)(2) (West 2010). If the court decides that the petition is frivolous or patently without merit, it must dismiss it in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2010). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶10 A *pro se* petition seeking relief under the Act may be summarily dismissed as frivolous or patently without merit under section 122-2.1(a)(2) if it has no arguable basis either in law or in fact. A petition lacks an arguable basis in law or in fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Id.* at 16. Issues that could have been raised on direct appeal, but were not, are considered forfeited and therefore barred from consideration. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005).

¶ 11 The State first contends that defendant forfeited this issue because he could have raised it on direct appeal. It argues that the facts that the trial court misstated the maximum sentence and that trial counsel failed to correct the misstatement were in the record and that defendant does not rely on any facts outside the record in stating his claim. However, defendant's allegation that he was induced to plead guilty by the prospect of a 60-year sentence was not in the record. Thus, the issue is not forfeited.

¶ 12 On the merits, defendant claims that his counsel's representation was defective. He cites *People v. Correa*, 108 Ill. 2d 541 (1985), for the proposition that a guilty plea can be involuntary where it was induced by counsel's misrepresentations. The State responds that *Correa* must be interpreted in light of *Hill v. Lockhart*, 474 U.S. 52 (1985), which applied the *Strickland* ineffective-assistance-of-counsel standard to cases in which counsel advised the defendant about a guilty plea. *Id.* at 57-59 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). The State further argues that defendant cannot show the requisite prejudice under *Strickland* because he does not claim that he is actually innocent and has not articulated a plausible defense. See *People v. Rissley*, 206 Ill. 2d 403, 459 (2003) (defendant claiming ineffective assistance in connection with guilty plea unaccompanied by either a claim of innocence or the articulation of any plausible defense that he could have raised had he opted for a trial cannot show prejudice under *Strickland*).

¶ 13 Defendant's argument fails for at least two reasons. First, its underlying factual allegations are contradicted by the record. See *Hodges*, 234 Ill. 2d at 16. In support of his motion to withdraw the guilty plea, defendant testified that he accepted a blind plea because he believed that his minimal criminal record would result in a sentence close to the minimum. This refutes any suggestion that defendant pleaded guilty because he feared receiving an extended-term sentence. The petition itself

alleged, in support of its claim that counsel was ineffective for suggesting that defendant's relative lack of a criminal record would result in a sentence close to the minimum, that "it can hardly be said that the defendant was the victim of misrepresentation, inducement and misapprehension." Rather, defendant, "with full understanding and the advice of his counsel, took a calculated risk that the punishment meted out by the court might be less severe than he would receive upon a trial before a jury." Thus, defendant cannot now claim that he was led to plead guilty by the trial court's incorrect admonishment that he was eligible for an extended-term sentence, or his attorney's failure to correct it.

¶ 14 Moreover, as the State points out, defendant does not advance a claim that he is actually innocent or articulate a plausible defense that he could have raised had he gone to trial. His petition suggested that counsel should have explored a defense that defendant's conduct was accidental, but the petition alleged no specific facts and contained no evidence to support such a claim. Thus, defendant cannot show prejudice under *Strickland*.

¶ 15 Because the factual premise of defendant's petition is contradicted by the record, and because defendant has not fully articulated a plausible defense, the trial court properly dismissed the petition. As noted, the petition contained other claims, but defendant does not contend on appeal that any of them had merit, thus forfeiting any such claim.

¶ 16 The judgment of the circuit court of Du Page County is affirmed.

¶ 17 Affirmed.